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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 896

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York, and the DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK,

Defendants-Appellants,

—against—

EDNA ROTHSTEIN, SYLVIA MILLER, HENRIETTA BATSON, CATHERINE JONES and DOLORES HARVANEK, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees.

BRIEF *AMICI CURIAE* OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW AND THE COUNTY OF NASSAU

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October Term, 1969

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George K. Wyman, as Commissioner of the Department of Social Services of the State of New York, and the Department of Social Services of the State of New York

Defendants-Appellants

against

Edna Rothstein, Sylvia Miller, Henrietta Barnes, Catherine Jones and Dorothy Hansen, as individuals and on behalf of all other persons similarly situated,

Plaintiffs-Appellees

BRIEF *AMICI CURIAE* OF THE CENTER ON SOCIAL WELFARE POLICY AND LAW AND THE COUNTY OF NASSAU

Interest of *Amici Curiae*

The Center on Social Welfare Policy and Law is the specialized welfare law resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated with the Columbia University School of Law, the Center

The Center on Social Welfare Policy and Law files this brief pursuant to Rule 42(4) of the Rules of the Supreme Court, written consent of the parties having been filed with the Clerk. The County of Nassau files this brief pursuant to Rule 42(4)

undertakes research pertaining to the legal rights of welfare recipients and supports OEO-funded legal services programs and other legal organizations through education and assistance in the preparation of important litigation. It also maintains the nation's only comprehensive private collection of state public assistance regulations and manuals. Attorneys from the Center have appeared before this Court this term in *Goldberg v. Kelly*, 38 U.S.L.W. 4223 (March 23, 1970); *Barton v. Collins*, 38 U.S.L.W. 4195 (March 2, 1970); and *Rhoades v. Henry*, 38 U.S.L.W. 4261 (April 6, 1970), and have submitted briefs amicus curiae in *King v. Smith*, 392 U.S. 309 (1968); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Wheeler v. Montgomery*, 38 U.S.L.W. 4251 (March 24, 1970); *Simmons v. Housing Authority of Fall River*, cert. filed, 1969, No. 81; *Riddle v. Connecticut*, cert. filed, 1969, No. 905; *Sinks v. Gregory*, cert. filed, 1969, No. 200; *Rhodes v. Rhoades*, 38 U.S.L.W. 4277 (April 6, 1970); and *Lewis v. Martin*, cert. filed, 1969, No. 829.

The Center has a continuing concern with questions involving the administration of state plans under the federally aided public assistance programs, and with the enforcement of federal law as it applies to such plans. It is particularly interested in questions of fairness in the establishment of the amounts of the grants paid to public assistance recipients under the federal programs.

The County of Nassau, located on Long Island just outside the boundaries of New York City, is one of the suburban counties whose public assistance recipients have been adversely affected by the payment differential here at issue. The County's population of 1,428,838 includes approxi-

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Attorneys for the Center participated in proceedings in this case in the District Court but are not involved in this appeal.

mately 40,000 public assistance recipients, with whose welfare the County government is vitally concerned. The County is particularly concerned with protecting its welfare population from discriminatory treatment imposed on the basis of their place of residence, by state statute and regulation. Because it is aware that the cost of living for Nassau County residents is at least as great as that for New York City residents and because it wishes to provide support for its residents who appear as appellees, the County joins in the filing of this *amicus* brief.

Amici completely agree with appellees' position that New York State has denied them the equal protection of the laws to which they are entitled, and this would urge the Court to affirm the decision of the statutory court, which so held. Amici, however, firmly believe that the injunction issued below was equally required by certain fundamental principles embodied in the Social Security Act. In view of the cursory treatment given to the federal statutory question by the court below, as well as by appellants in their brief to this Court, the County and Nassau County believe that their function as amici curiae would best be served by presenting to this Court the full range of statutory issues raised by this case, in recognition that this Court properly seeks whenever possible to avoid unnecessary constitutional adjudication.

Summary of Argument

I.

Each of the public assistance titles of the Social Security Act contains three so-called statewideness requirements: that the public assistance program be in operation throughout the state, that it be administered or its administration supervised by a single state agency, and that there be state financial participation. The concrete implications of the statewideness requirements in light of the historical background and legislative history of the Social Security Act, as well as its interpretation and application by the Department of Health, Education, and Welfare, are that those items of subsistence comprising a state's standard of need must apply equally to all localities within the state and that geographical variations in the amount of grants paid within the state are permissible only if based on objective differences in the cost of some or all of those items.

The differential in grant levels challenged here, under which recipients living in the suburban counties surrounding New York City receive lower amounts than recipients living in the City proper, violates the federal statewideness requirements by not being based on objective cost differences in items of need recognized throughout the state. Its most plausible basis, and one urged by appellants, is the reluctance of many counties outside the City to contribute the local share of increased grant amounts, a basis explicitly prohibited by federal regulation. Even were such considerations valid under the Act, the appearance of Nassau County as amicus demonstrates the unfairness inherent in grouping those counties unwilling to bear

their share of welfare cost—together with those counties, such as Nassau, that are willing to recognize the needs of their welfare population. The justification of the challenged differential by appellants in terms of the "social cost of urban living" becomes on analysis a reflection a past administrative practices under which grants for special needs had been more freely given in New York City than elsewhere in the state and under which the City had been the subject of a demonstration project pursuant to which certain special needs had been budgeted on a recurring basis. The fact that the grant differential reflects past practices in the City regarding special needs means that such needs are at least partially being recognized as to City residents while being totally unrecognized as to those living elsewhere, in violation of the federal requirement that a state's standard of need contain the same items as to all localities. Finally, the particular cost differences advanced by appellants have no basis in any objective data, a violation of the federal requirement that differences in grant levels within a state be based on facts.

II

The district court should have adjudicated the statutory claim without waiting for a ruling from HEW. In *Rosado v. Wyman*, —— U.S. —— (April 6, 1970), this Court held that, since welfare recipients have no procedure whereby they may obtain a determination of their claims from HEW, there is no basis for denying them a prompt federal court adjudication. The merits of the statutory claim are thus properly before this Court. Even if the Court determines that HEW's views should be considered before statutory claims are resolved by the courts, the preliminary injunctions should still be affirmed. By letter to appellant

Wyman, the HEW Regional Commissioner has indicated that New York does not have a statewide standard being applied uniformly throughout the state.

I.

The differential in grant schedules between New York City and its surrounding counties violates the Social Security Act's requirement of statewide uniformity.

It is a well-established jurisdictional tenet that this Court will avoid deciding a question of constitutional validity if construction of a statute can be equally dispositive of the case before it. E.g., *Harmon* v. *Brucker*, 355 U.S. 579 (1958). Thus this Court in *King* v. *Smith*, 392 U.S. 309 (1968), in affirming the district court's finding of invalidity as to Alabama's substitute-father rule, rested its judgment on a construction of the Social Security Act and declined to consider the equal-protection ground advanced below. Indeed, in *Rosado* v. *Wyman*, —— U.S. —— (April 6, 1970), this Court noted that under *King* v. *Smith* a district court is "obligated to adjudicate [the] statutory claim in preference to deciding the original constitutional claim." Slip op. at 3. The instant case presents another opportunity for affirming the decision below without reaching the constitutional question; as *amici* intend to demonstrate, the considerations that led the district court to its holding under the Equal Protection Clause apply with equal force to certain fundamental principles embodied in the Social Security Act. Moreover, as demonstrated in point II, the district court's reluctance to treat this statutory issue was entirely without foundation.

A. Federal law and regulations require that public assistance grants reflect the same items of need in all subdivisions of a state and that differences in grant amounts reflect objective differences in the cost of items of need.

Titles IV and XVI of the Social Security Act require, in identical language, that a state plan for aid to families with dependent children or for aid to the aged, blind, or disabled must

> "provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." §§ 401(a)(1) and 1602(a)(1) of the Act, 42 U.S.C. §§ 602(a)(1) and 1382(a)(1).

This requirement of statewide operation of public assistance plans is buttressed by the further requirements that there be state financial participation in such plans, §§ 402(a)(2) and 1602(a)(2) of the Act, 42 U.S.C. §§ 602(a)(2) and 1382(a)(2), and that there be a single state agency either to administer such plans or to supervise their administration, §§ 402(a)(3) and 1602(a)(3) of the Act, 42 U.S.C. §§ 602(a)(3) and 1382(a)(3).[3]

The concrete meaning of statewideness in public assistance administration can best be drawn in light of a consideration of the historical backdrop to and the legislative history of the entry of the federal government into the public assistance field. This consideration ultimately leads

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[3] The provisions in Title IV relate to Aid to Families with Dependent Children (AFDC), those in Title XVI, to the combined program of Aid to the Aged, Blind, or Disabled (AABD), which has been adopted by New York State. Identical provisions also appear in Title I, Old Age Assistance (§ 2(a) of the Act, 42 U.S.C. § 302(a)); Title X, Aid to the Blind (§ 1002(a) of the Act, 42 U.S.C. § 1202(a)); and Title XIV, Aid to the Permanently and Totally Disabled (§ 1402(a) of the Act, 42 U.S.C. § 1352(a)).

to the conclusion that the statewideness requirements mean that those items of need that make up a state's standard of need must be identical in all parts of the state and that differences in grant amounts based on the place of residence of the recipients must represent only differences, objectively determined, in the cost of items comprising the standard of need. As we shall explain below, appellants have not complied with these requirements.

Prior to the assumption by the federal government in 1935 of primary responsibility in the field of public assistance, public aid to the poor was a matter entirely of state and local concern. The implications of this fact in terms of unequal treatment of equally needy individuals within a state formed an important part of the legislative context in which the Social Security Act of 1935 was enacted. One of the primary purposes of federal involvement in public assistance was the elimination of the discretionary power of local officials that had frequently resulted in irrational intrastate differences in amounts of assistance paid to equally needy individuals.

Thus the President's message recommending legislation on economic security noted that the application of state old-age pension laws was often optional on the part of counties and that such assistance was financed almost entirely with local funds. Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 22 (1935). The presidential Committee on Economic Security noted that the effectiveness of old-age pension laws depended largely on the extent of state involvement in administration and financing. Social Security Board, *Social Security in America, A Summary of Staff Reports of the Committee on Economic Security* 161, 163 (1937). Thus the Committee

recommended that responsibility for administration of assistance to the aged be centralized within the state so as to "avoid a diversity of operating standards in the subdivisions within the states." *Id.* at 191.

As to aid to needy children, the situation was similar. Most state laws were only permissive, and even in states with mandatory laws it was common for particular counties to be either unwilling or unable to make assistance payments at all. Financing was almost entirely local. Douglas, *Social Security in the United States* 186-87, 192 (1936); *Social Security in America, supra,* at 234. See also Message of the President, *supra,* at 30; H.R. Rep. No. 615, 74th Cong., 1st Sess. 10 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 17; Abbott, *From Relief to Social Security* 274 (1966). Thus in Illinois in 1934, for example, some counties did not participate at all in that state's mother's aid program, while those that did made payments ranging from a low of $19 per child per year to a high of $274. *Id.* at 209-10.

It was in light of this fact of gross intrastate inequalities in public assistance payment levels that the President proposed and Congress enacted the requirements of statewide operation, state financial participation, and a single state administrative agency as conditions for the receipt of federal funds for public assistance under the Social Security Act. Of all provisions of the Act, these three have been characterized as having had "the greatest effect upon the organization and administration of public welfare agencies in the states." Brown, *Public Relief, 1929 to 1939* 350 (1940). When the program of Aid to the Permanently and Totally Disabled was added to the Act in 1950, P.L. 734, 81st Cong., 64 Stat. 477 (1950), and when the combined program of Aid to the Aged, Blind, or Disabled was enacted

in 1962, P.L. 87-534, 76 Stat. 172 (1962), the three statewideness requirements were inserted in those titles as well.

It was established at the outset of administration of the Act that the statewideness requirements mandate statewide uniformity in standards of assistance. Rejecting the argument that the requirement of statewide operation did not imply uniform statewide standards,

> "[t]he [Social Security] Board [predecessor of HEW] point[ed] out that uniform standards did not mean uniform payments, if the cost of living varied throughout the state, but only that persons with the same resources and needs should be treated the same. Actually, it was demonstrated in the course of time that the wide variations in payment within a state bore little relationship to variations in the cost of living. In fact, it was discovered that with the exception of rent, the variation in the cost of living was surprisingly small throughout a state, even between rural and urban areas." Altmeyer, *The Formative Years of Social Security* 81 (1968).

Treating alike "persons with the same resources and needs" implies that the same needs will be met as to such persons throughout the state; that the budgetary components that comprise a public assistance grant will be the same in each case; and that differences in grant levels are permissible only to reflect differences in the cost of the component items that comprise the public assistance grant.[4] This is made abundantly clear in current regula-

[4] Differences in the items included in the standard of need may properly be based on different needs individually determined; thus in some states, differences in grant amounts are attributable to recognition of items of special need, such as medically mandated diets, recognition of which results in an increase in the grant.

tions of the Department of Health, Education, and Welfare. HEW has interpreted the statutory requirement of statewide operation of a public assistance plan to mean that "State policies, standards and methods will apply equally to persons in like situations wherever they may live"; more particularly, "the specific eligibility factors for each assistance program, including resources and standards of need, . . . are uniformly applied in area offices or political subdivisions." Dept. of Health, Education, and Welfare, *Handbook of Public Assistance Administration* [hereinafter "HEW *Handbook*"], Pt. II, § 4300. The requirement that a single state agency administer or supervise the administration of public assistance programs is designed to insure that an administrative unit of statewide authority "is accountable for insuring that funds will be available in all political subdivisions for assistance payments and for operation of the program on a uniform basis." *Id.*, § 2300. Finally, the requirement of state financial participation in public assistance programs implies that "State and Federal funds will be apportioned among the political subdivisions on a basis consistent with equitable treatment of individuals in similar circumstances throughout the State." *Id.*, § 3200.3. The three plan conditions thus contemplate that public assistance plans will be characterized by statewide uniformity and that all applicants and recipients within the state will receive the same treatment at the hands of the public assistance system regardless of their place of residence.

New York, however, eliminated special grants with the enactment of § 131-a, and thus the issue of differences in the need standard based on individual differences in need does not arise in this case. It should be noted that HEW requires that states recognizing special needs include in their state plan a description of those needs and the circumstances under which they will be met. 45 C.F.R. § 233.20(a)(2)(v), 34 Fed. Reg. 1394 (1969).

The primary purpose of both public assistance titles here at issue is to furnish financial assistance to needy individuals and families, §§ 401 and 1601 of the Act, 42 U.S.C. §§ 601 and 1381, and the most critical aspect of public assistance for its beneficiaries is the level of assistance they receive. Accordingly, the most important implication of the requirements of statewide operation, a single state agency, and state financial participation is found in their relation to the method of establishing standards of assistance. HEW in this connection has established the requirement that state plans for public assistance must "[p]rovide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis"; state plans further must "[s]pecify a statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment," which standard must "be uniformly applied throughout the State." 45 C.F.R. § 233.20(a)(1), (2), 34 Fed. Reg. 1394 (1969).

HEW has advised the states that "any variation in cost standards by areas within a State must be justified by facts." Dept. of Health, Education, and Welfare, *Simplified Methods for Determining Needs* 1 (1964), and that such facts must be "objective." 45 C.F.R. § 233.20(a)(1), 34 Fed. Reg. 1394 (1969).

The application of these principles in the concrete New York situation was succinctly stated in a recent letter from HEW to appellant Wyman:

> "[T]he State standard must represent items of need to be made available to all recipients statewide. Differences in money amounts, if they exist, must result from demonstrable differences in the cost of these items in

various sections of the State." Letter of November 10, 1969 from HEW Regional Commissioner James Callison (A. 174).[5]

B. New York's payment of lower benefit amounts to public assistance recipients in counties surrounding New York City than to those in the City is not based on demonstrable differences in cost of items included in a statewide standard of need.

Appellants have acknowledged the most plausible but most patently impermissible explanation for the fact that public assistance recipients in counties surrounding New York City receive lower benefits than those paid in the City. They argue that the payment differential

> "demonstrates the State Legislature's concern for the ability to pay of the various welfare districts since they would be required to pay one-quarter of any increase over the established levels." Appellants' Brief at 38.

Such a consideration, of course, is precisely the evil at which the federal statewide uniformity requirements are directed, for it was precisely the inability to pay on the part of many localities that created the wide variations in grant levels characteristic of the mothers' aid and old-age pension programs prior to 1935. HEW has explained the "underlying objectives" of the requirement of state financial participation in public assistance plans, §§ 402(a)(2) and 1602(a)(2) of the Act, 42 U.S.C. §§ 602(a)(2) and 1382(a)(2), as being

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[5] Numbers in parentheses preceded by "A." refer to pages of the Appendix.

> "(a) to assure a broader base of financial support of the programs than would be possible if only local funds were used, thus guarding against placing upon the political subdivisions of a State undue burdens for financing public assistance; and (b) under State supervision, to facilitate Statewide maintenance of the standards of each State plan." HEW *Handbook*, Pt. II, § 3300.

HEW goes on to note that "The varying and sometimes limited tax resources of a local government could, if not equalized by State and Federal funds, result in inequitable provision for assistance and administration among localities within a State." *Id.* Thus appellants' reliance on the presumably unequal "ability to pay of the various welfare districts" as a justification for the challenged payment differential flies in the face of the state's responsibility, under federal law, to assure that such varying abilities to pay on the part of localities do not operate to the detriment of the ultimate beneficiaries of public assistance.

Appellants have surrounded their fiscal argument with a number of other asserted justifications for the challenged payment differential but have failed to show cost differences between the two areas involved that justify the payment differential. At best, the justifications advanced by the state are a verbal smokescreen proving nothing. At worst, they prove only that the reason for the payment differential is the inclusion of certain items in the standard of need for City recipients that are not included in the standard applied to those in the surrounding counties.

I. There are in fact no demonstrable differences in living costs between New York City and the surrounding counties.

Prior to March 1969, New York well understood its obligation to vary payments only as the cost of meeting need varied throughout the state:

> "A principal consideration in determining the adequacy of assistance and care shall be the sufficiency thereof for maintenance in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities." N.Y. Soc. Serv. L. § 131(3) (emphasis added).

Pursuant to this policy and to his authority under former § 131 to establish grant schedules, appellant Wyman had divided the state for payment purposes into three geographical areas. Nassau and Westchester Counties, along with five other suburban counties, were included in a single payment area with New York City, known as SA I (A. 41, 50). A cost study carried out in May 1968 had formed the factual basis for grouping the suburban counties in the same payment area as New York City (A. 50). The only difference in payment levels in other geographical areas of the state was for objectively verified differences in utility rates (A. 41).

No further cost study had been made at the time § 131-a (the provision here under attack) was enacted in March 1969 (A. 51-52); yet the Legislature in enacting § 131-a removed the suburban counties from former SA II and placed them with the rest of the state in a new payment area. Nor had a further cost study been made at the time appellant Wyman acted in June 1969 to create a new pay-

ment area for the suburban counties that had the effect of narrowing but not closing the gap between benefits paid in such counties and those paid in New York City (A. 55).

Thus the combined effect of § 131-a and the administrative action taken by appellant Wyman thereunder was to treat New York City as being *sui generis*,[6] despite the fact that the only available objective data demonstrated that there was no variation in the cost of living as between New York City and its surrounding counties. Indeed, the entire metropolitan area has been treated as a single economic unit by the Labor Department's Bureau of Labor Statistics in its compilation of various cost schedules on which appellants have in the past in part relied. 303 F. Supp. at 344, n. 4.

As recognized by the court below, appellants' unsupported notions are based on a stereotypic view of the life style of the poor in the metropolitan counties surrounding the City that can only be characterized as an "unreal one":

> "The picture of suburban welfare recipients living in garden apartments (the term used in oral argument),

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[6] Appellants make much of the various ways in which New York City is unique. While we have no desire to denigrate the City's uniqueness for many purposes, we fail to see the relevance to the issue before this Court of, for example, the greater crime rate in the City, Appellants' Brief at 28; the treatment of the City as a separate entity for purposes of the Multiple Dwelling Law or the Code of Criminal Procedure, *id.* at 39, or the fact that welfare recipients in the City are both more numerous and are members of minority groups more frequently than elsewhere in the state, *id.* at 35. The mention of these factors has a distinct ring of afterthought and is unsupported by any data relating any of them to a differential between the City and its surrounding counties in the cost of purchasing items of subsistence, which is the only class of differential that would justify the differential in levels of public assistance payments.

> located on the edge of a park . . . ignores the existence of many rundown tenements in the slum districts of our surrounding suburban counties, which unfortunately provide the principal housing facilities for welfare recipients." 303 F. Supp. at 349.

More particularly, the official view of living conditions for the poor in metropolitan counties ignores such facts as the following, offered by the Congressman whose district includes Westchester County:

> "'Yonkers, the state's fourth largest city [located in Westchester], has badly deteriorated housing, poor Negro and Puerto Rican populations, and terrible school problems—the whole complex of urban ills,' he says. 'And there's real poverty in some of the towns and villages.'" "Westchester: The Land of Let's Pretend," *New York*, Vol. 3, No. 6, 24, 26 (Feb. 9, 1970), quoting Rep. Richard L. Ottinger.

Although "[m]any people in the county like to think of Yonkers as an atypical cesspool, really an extension of New York City," there are other communities in the county also exhibiting signs of urban decay: "The towns settled along the Penn Central's Hudson division are all infested by rotting dwellings, inhabited by the poor population that each community has but prefers not to see." *Id.* at 28.

When pressed on the facts, appellants must admit that there was no basis for the differential established by § 131-a. In an earlier case this term, they assured this Court that the items included within the standard of need for public assistance recipients "have not been altered" by § 131-a, their cost has just been recalculated. Respon-

dents' Brief at 55 in *Rosado* v. *Wyman*, O.T. 1969, No. 540.[7] Yet allowances to meet that standard suddenly differ as to areas formerly treated alike, despite the absence of any new study demonstrating a difference in the cost of items included in the standard. Appellants here concede that what they term the "higher actual cost of living to metropolitan residents"[8] is "not reflected in item-by-item specifications in the standard of need." Appellants' Brief at 15. What they neglect to concede but what should be apparent is that no such specification would be possible because there is no evidence of any such variation whatsoever. There is nothing in the record, see 303 F. Supp. at 349, that offers a scintilla of factual evidence that the cost of any item of need is higher in New York City than in the suburban counties. (It should be noted that the one item of need for which a cost differential admittedly exists—housing—is not involved in this case. Housing costs are paid under a separate determination on the basis of actual cost to each recipient regardless of geographical location [A. 97].)

Appellants seek to gloss over this gap in the record by making much of the so-called "social cost of urban living" in New York City. This is primarily an attempt to justify inclusion within the standard of need applicable to New York City residents of certain items not included in the standard applicable elsewhere, a justification the impermissibility of which *amici* will demonstrate below. Ap-

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[7] This contention on the part of the state has recently been rejected by this Court. *Rosado* v. *Wyman*, *supra*, slip op. at 17.

[8] While under normal English usage a resident of Nassau or Westchester County would fall within the class "metropolitan resident," *i.e.*, a resident of the New York metropolitan area, it is clear that appellants are here referring to residents of New York City only.

pellants further contend, however, that this concept can be seen as encompassing higher costs of particular items of need that are recognized on a statewide basis.[9] They allege, for example, that sales taxes comprise a "substantial component" of the City's higher cost of living, Appellants' Brief at 28, but neglect to mention that sales taxes have always been budgeted in public assistance grants without being reflected in a differential in payment. Moreover, if sales taxes are an important factor in computing need, this factor should be reflected in varied payment levels between Nassau County (a 5% tax area), Westchester County outside of Yonkers (a 3% tax area), the Yonkers portion of Westchester County (a 5% tax area), and other counties upstate with sales tax rates ranging from 2% to 5%. Laundry costs and cleaning supplies, see Appellants' Brief at 16, had also been computed in the recurring grant under the prior schedules without being reflected in a payment differential (A. 47). Without any repricing since May 1968, it is impossible to imagine how it could objectively have been determined that the cost of these items in New York City had risen faster than their cost in surrounding counties. The costs of deterioration in housing, according to the only authority appellants cite, have become "capital losses" to owners, not to the welfare recipients who are their tenants. Appellants' Brief at 26-27. The state surely does not mean to imply that it is paying welfare recipients for losses accruing to third parties for which the recipients bear no liability.

[9] Appellants' arguments in this connection are addressed to the issue of equal protection, as were the findings of the court below. The question of whether the grant differential has any basis in objective differences in the cost of recognized items of need, however, is equally relevant, if not more so, to the question of conformity with the statewideness requirements of the Social Security Act.

The fact that there are no genuine cost differences as to New York City that justify payment differentials and that the present § 131-a violates statewideness requirements have most recently been affirmed by appellants themselves. New York's Governor has reported to the Legislature that "The [State] Board [of Social Welfare] has recommended the establishment of statewide standards of public assistance." New York Governor's Message to the Legislature 17 (1970). In response, the Governor has introduced legislation that would establish a single schedule of monthly grants applicable throughout the state. S. 7359, 1970 Legislative Session, introduced Feb. 9, 1970. This recommended legislation belies appellants' claims before this Court. Prior to May 1, 1969, the state's cost studies showed that New York City and surrounding areas should be in a single payment category and that statewide variations were dependent only on utility cost variations. The Governor's 1970 legislative proposal reaffirms the state's pre-1969 policy. No amount of squirming in appellants' brief can hide the fact that the state has consistently showed a different face out of court. The out-of-court position that there are no significant cost differentials is what this Court should rely upon.[10]

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[10] Not only has no showing been made that the Legislature and the Commissioner established higher payment levels for New York City on the basis of objectively determined higher costs in the City, the slim evidence in the record of cost differentials between the City and its surrounding counties points to greater costs as to the latter. The court below found, for example, that

> "the cost of transportation to recreational facilities, museums, beaches and hospitals in the surrounding counties, such as Nassau, is substantially greater than that incurred by New York City residents who are located closer to such facilities and have cheaper transportation available to them." 303 F. Supp. at 349.

2. *New York has established one standard of need for New York City and another standard for the rest of New York State.*

The two schedules of monthly public assistance allowances established by § 131-a, both "deemed to make adequate provision for all items of need," reflect a determination by the state to compute the allowances applicable to New York City residents on the basis of items of need not reflected in the allowances applicable to residents of the rest of the state. This determination also underlaid the administrative action taken by appellant Wyman when he exercised his authority under § 131-a to increase allowances as to counties surrounding New York City but continued to provide for a differential in grant amounts as between those counties and the City. Both in its legislative and administrative embodiment, this discrimination is clearly contrary to the federal dictates of statewide uniformity in the public assistance standard of need.

Appellants' major argument in support of payment differentials is that the bonus given New York City recipients represents "the nature of the urban crisis and the higher social cost of living in the metropolitan center." Appellants' Brief at 32; affidavit of Vernon Murphy (A. 93).[11] Appellant Wyman, when queried as to his justification for raising grant levels in the counties surrounding New York City so as to narrow but not close the gap in payments between those counties and the City, stated that the continuing differential represented

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[11] It is interesting to note that this explanation for the higher payment level as to New York City recipients was distilled from the application to HEW for approval of the cyclical grant experiment in New York City, a demonstration project that explicitly was not designed to increase benefit levels, see note 21, *infra*.

> "the complexities of urban living in the City of New York, the necessity for provision of transportation items on a regular basis, the fact that there are cultural opportunities, readily available transportation, community center facilities, and clinic facilities in New York City that are not available in other areas of the state to the same extent, certainly not the components of the urban living requirements." Deposition of Commissioner Wyman (A. 59).

In fact, as can be historically demonstrated, this "social cost of living" shibboleth is but a camouflage for the fact that certain items of need are being recognized as to New York City recipients but not as to recipients living elsewhere in the state.[12]

As pointed out above, the grant schedules in effect prior to the enactment of § 131-a divided the state into three geographical areas; variation in the amount of payments among the areas was attributable solely to differences in the cost of utilities (A. 41), and Nassau and Westchester Counties were included in a single payment area with New York City (A. 50). While the differences in the recurring grants for the three areas were quite small, see Appellants' Brief at 7, "actual average payments per recipient . . . were, because of a much greater frequency of special grants, substantially higher within New York City." *Id.* at 37. More specifically, higher payments for New York City recipients resulted

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[12] The unanimous district court found that

> "There is no evidence that the factor of 'social cost of living' . . . was considered by the Legislature at the time when it enacted § 131-a, and defendant Wyman testified that as far as he knew the Legislature did not have before it any evidence pertaining to the cost or use of such cultural activities." 303 F. Supp. at 344.

> "from the wide variety of practices of local districts regarding special grants, the availability of information in New York City, greater accessibility of welfare offices, the recipients' attitude toward welfare and their degree of organization, their resultant sophistication and willingness to take advantage of opportunities within the system." Affidavit of Acting Social Services Commissioner George W. Chesbro, *Rosado* v. *Wyman*, O.T. 1969, No. 540, Appendix at 98.

This is the "real differential," *id.* at 99, that was incorporated into the schedules established by § 131-a and then, by way of afterthought, given the ephemeral designation of "social cost of living."

The adoption of a standard of need based in part on variant local practices is a violation of the federal requirement that a state plan be administered uniformly. HEW *Handbook*, Pt. II, § 4300. The determination to add to City grants an amount representing this "real differential" was based not on objective differences in the cost of meeting certain universally recognized needs in New York City, but on the political activism of New York City recipients that had been reflected in a greater number of requests by such recipients for items formally available to all recipients.[13] Uniformity is intended to ameliorate local differences by requiring objective treatment of the needs of all recipients; New York has instead reinforced local differences by incorporating into the statutory scheme a differential reflecting the subjectivity of former administrative practices and political realities.

[13] As will be discussed *infra*, it is no answer to this fact to argue that recipients outside the City did not need these items.

When appellants go into detail in supporting the "social cost of urban living," it becomes clear that it is based, if on anything, on providing additional items of need for New York City residents. They say it is designed to satisfy the "higher level of aspiration" and "greater expectations" of City residents. Affidavit of Vernon Murphy (A. 94). It includes, as entirely new items in a standard of need applicable only to New York City, transportation to and use of available cultural opportunities, community centers, and clinical facilities (A. 59). Provision for recreational activity was never made under the prior standard of need (A. 60), and appellants have previously represented to this Court that the "items comprising the standard of need in New York have not been altered" by the enactment of § 131-a. Respondents' Brief, *Rosado* v. *Wyman, supra*, at 55. Yet appellants now offer these new items of need as the justification for the challenged differential in payment levels.

If cultural opportunities are a proper item of need in New York City (and we would most strongly urge that they are), they are no less a need of welfare residents outside the City. If anything, the greater cost of public transportation from Nassau County to cultural resources creates an even greater economic need for assistance in this respect. Appellants' rationale in the final analysis amounts to saying that where the cost of some items is substantial, the public assistance system will decline to pay for them and will justify that refusal by asserting that recipients in those areas do not have those needs. Appellants' Brief at 40. To say that certain facilities are "more available" in New York City than in Nassau or Westchester Counties (A. 59-60) is but to say that it is cheaper for the welfare system to pay for the use of those

facilities by New York City recipients than to pay for their use by suburban recipients. Rather than provide additional payments for use of such facilities by suburban residents, the state has simply ignored their cost as to such residents on the specious theory that they are simply not needed. This, we submit, is not a uniform statewide standard.[14]

The conclusion that the challenged payment differential is based on the addition of items of need for New York City residents is confirmed by an examination of the history of § 131-a. Prior to the adoption of § 131-a in March 1969, appellant Wyman had the duty under Social Services Law § 131 "to provide adequately for those unable to maintain themselves." He administratively established on a statewide basis the public assistance standard of need and level of benefits, which included a recurring grant for all recipients in the state to cover food, clothing, personal incidentals, household supplies, school expenses, utilities, laundry, and sales taxes (A. 92-93). In addition to those items represented by the recurring grant, the statewide standard also included special items of need available to any recipient in accordance with his or his family's particular requirements. Critical items for which special grants were provided included major clothing replacements,[15] home furnishings,[16] medically dictated diets,[17] tele-

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[14] The actual availability of recreational and cultural facilities in suburban counties as compared with New York City remains undocumented; appellant Wyman has conceded not having conducted any studies of the question (A. 60).

[15] Former 18 N.Y.C.R.R. § 352.4(c).

[16] Former 18 N.Y.C.R.R. § 352.5(j).

[17] Former 18 N.Y.C.R.R. § 352.4(b)(7), (8), (9).

phone service,[18] transportation,[19] certain educational necessities,[20] and expenses related to infancy.[21]

In 1968 a demonstration project was initiated under which special grants for clothing and furniture were eliminated as to recipients living in New York City. In their place a quarterly grant of $25 per recipient was added to the regular recurring grant. *Rosado* v. *Wyman*, *supra*, slip op. at 17. Approval of HEW under § 1115 of the Act, 42 U.S.C. § 1315, was required for institution of the demonstration project because without such approval the project would have violated the requirement of uniform statewide operation of public assistance plans (A. 52). HEW approval of this experiment was granted on the basis that the so-called cyclical grant would represent a different method, administratively less cumbersome than the special grant system, of meeting universally recognized needs. This was not a decision that certain needs of New York City recipients could be recognized while not being recognized as to recipients elsewhere in the state (A. 53).[22] That

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[18] Former 18 N.Y.C.R.R. § 352.5(i).

[19] Former 18 N.Y.C.R.R. § 352.5(p).

[20] Former 18 N.Y.C.R.R. § 352.5(d).

[21] Former 18 N.Y.C.R.R. § 352.4(e)(iv). The prior method of establishing individual need is discussed in *Rosado* v. *Wyman*, *supra*, slip op. at 17.

[22] The application for approval of the demonstration project submitted to HEW August 14, 1968 by the New York State Department of Social Services on behalf of the New York City Department of Social Services asserted that

> "It is clear that the introduction of cyclical payments for 'special' needs constitutes an innovation in the *administrative machinery and procedure* for processing special grants (as contrasted with the existing statewide plan) *rather than an*

is to say, recipients living outside the City were still eligible, on a showing of need, for special grants to cover the cost of clothing and furniture replacements. Appellants' Brief at 38. This Court has described the original grant experiment as a means of "accounting for basic and recurring items of need formerly subsumed in the special grant category by an averaging system." *Dandridge v. Williams*, *supra*, slip op. at 21. That opinion also refers to "special grants or the flat $100 grant" in a context in which they are clearly regarded as equivalent. *Id.* at 18. Indeed, HEW regulations specifically require that when a state's standard of need includes items of special need, the state public assistance plan must

> "(a) describe those items that will be recognized, and the circumstances under which they will be included, and (b) provide that *they will be recognized in the need determination for all applicants and recipients requiring them.*" 45 C.F.R. § 233.20(a)(2)(iv), 34 Fed. Reg. 1394 (1969) (emphasis added).

All special grants, including the experimental civilian grant, were eliminated with the enactment of § 131 a (A. 33). With the exception of rent and fuel for heating, which are separately budgeted, all items of need are now to be met by the basic semimonthly grant.

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increase in the level of *assistance payments*." (Emphasis in original.)

HEW's approval letter characterized the application as being a request "for waiver of Federal plan requirements specifically that of Statewideness." Letter of August 15, 1969 to Acting Commissioner Joseph W. Chesbro from HEW Regional Commissioner Joseph Callison.

Appellants use this loss of the cyclical grant as a justification for continued payment differentials. They explain the payment differential established by § 131-a as a recognition of the fact that City recipients by virtue of the cyclical grant experiment had received a higher recurring grant than that received by recipients elsewhere:

> "Thus, the Legislature was free to recognize that if in fact New York City and the rest of the State were treated equally, the City recipients would suffer a loss of income not suffered by the other recipients." Appellants' Brief at 33.

In other words, City residents were losing a fixed source of income—the cyclical grant—while other recipients were losing only an uncertain right to special grants. Since the cyclical grant amounted to $33.33 per month for a family of four and the new payment differential is $25.00 per month for the same family, the entire payment differential can be accounted for as partial compensation for the loss of the cyclical grant.[23] However, since appellants concede that "this cyclical grant replaced certain special grants which were available to recipients outside the City," *id.*, appellants' argument means that the new payment differential is designed to preserve a form of special needs payments to City residents while denying payment for those needs to all others. Such a result is precisely what the federal requirement of statewide uniformity of treatment

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[23] In fact, appellants seek to justify the payment differential on this basis. However, we note that contrary to their assertion that the $25 per month differential for a family of four is "precisely" the amount received by such a New York City family under the cyclical grant, Appellant's Brief at 33, the monthly amount attributable to the cyclical was $33.33, not $25.

is intended to preclude, because such a result means that the standard of need applied to City recipients differs from the standard of need applied to all other recipients.

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If uniformity and objectivity have any meaning, they mean that undocumented stereotypes and impressionistic attitudes may not be used as predicates for differentials in the amount of bare subsistence grants. Appellants have by afterthought written a brief that attempts to justify geographic payment differentials. But their brief cannot disguise the fact that the federal mandate that "State policies, standards, and methods will apply equally to persons in like situations wherever they may live," HEW *Handbook*, Pt. II, § 4300, has been blatantly ignored.

II.

This Court should affirm the decision below on statutory grounds without awaiting a determination of the statutory issue by the Department of Health, Education, and Welfare.

The court below, having granted plaintiffs' motion for a preliminary injunction on constitutional grounds, declined to adjudicate their claim that the establishment of allowance schedules applicable to Nassau and Westchester Counties that were lower than those applicable to New York City violated the Social Security Act. It held:

> "Since the schedules and regulations adopted by defendants are now under review by that agency [HEW] which possesses considerable expertise with respect to its own regulations and should be entitled to interpret

them in the light of the complexity of problems presented by various welfare programs, see 45 C.F.R. § 233.20[a](1), *we at this stage defer determination as to the requirements of the Social Security Act in anticipation of a ruling by H.E.W.*" 303 F. Supp. at 351 (emphasis added).

In a recent decision this Court squarely rejected this mode of procedure for federal district courts. In *Rosado* v. *Wyman, supra,* the Court of Appeals had held that the district judge should not have exercised his jurisdiction since HEW was "engaged in a study" of the validity of New York's AFDC plan under a provision of the Social Security Act not in question here. 414 F.2d 170, 176 (2d Cir. 1969). This Court concluded that the district court had properly decided the federal statutory claim. It held that since welfare recipients are unable to "trigger and participate in" HEW proceedings, "there is no basis for the refusal of federal courts to adjudicate the merits of these claims." Slip op. at 8 and n. 8.

Accordingly, the statutory claim raised here should have been adjudicated by the court below and may lay the basis for this Court's decision in this case. See *King* v. *Smith, supra. Amici* thus urge that in view of the invalidity of § 131-a under 42 U.S.C. §§ 602(a) and 1382(a), as demonstrated in point I, the preliminary injunctions must be affirmed.

Even if this Court should decide that it would have been inappropriate for the district court to adjudicate the statutory claim without first obtaining HEW's views, *cf. Rosado* v. *Wyman, supra,* slip op. at 8-9, *amici* contend that in the present posture of this case the preliminary

injunctions must still be affirmed. HEW's views on the merits of the statutory claim are now clear. In a letter to appellant Wyman, dated November 10, 1969, the HEW Regional Commissioner reviewed New York's justifications for the challenged differential in payments and concluded that "given the materials submitted to date, we are unable to find that there is in effect a statewide standard being uniformly applied throughout the State" (A. 174). This Court thus has before it the Department's views as to how its standards apply to the New York statute and regulations and therefore should adjudicate this statutory claim.

CONCLUSION

The preliminary injunctions entered by the district court should be affirmed.

Respectfully submitted,

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